

NEW RULES

# HOLDING MITIGATION PROPERTY AND ENDOWMENTS ©

An Overview of Mitigation Requirements

# Mitigation in a Nutshell

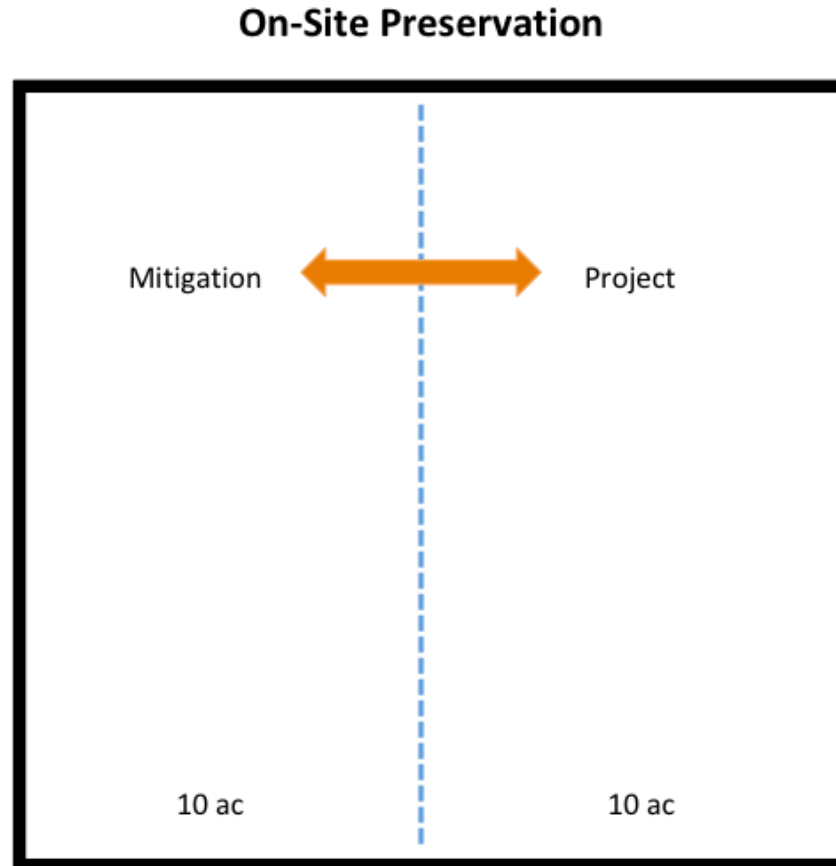
- If a project is going to destroy, impair or displace a natural resource, a number of different statutes allow or require actions to mitigate for the loss or impairment.
  
- Example:
  - Housing proposed for 20 acres of endangered species habitat, e.g., red-legged frog
  - Housing project can proceed, but must protect a minimum of 20 acres of habitat similar in quality to the acreage to be lost

# Mitigation in a Nutshell

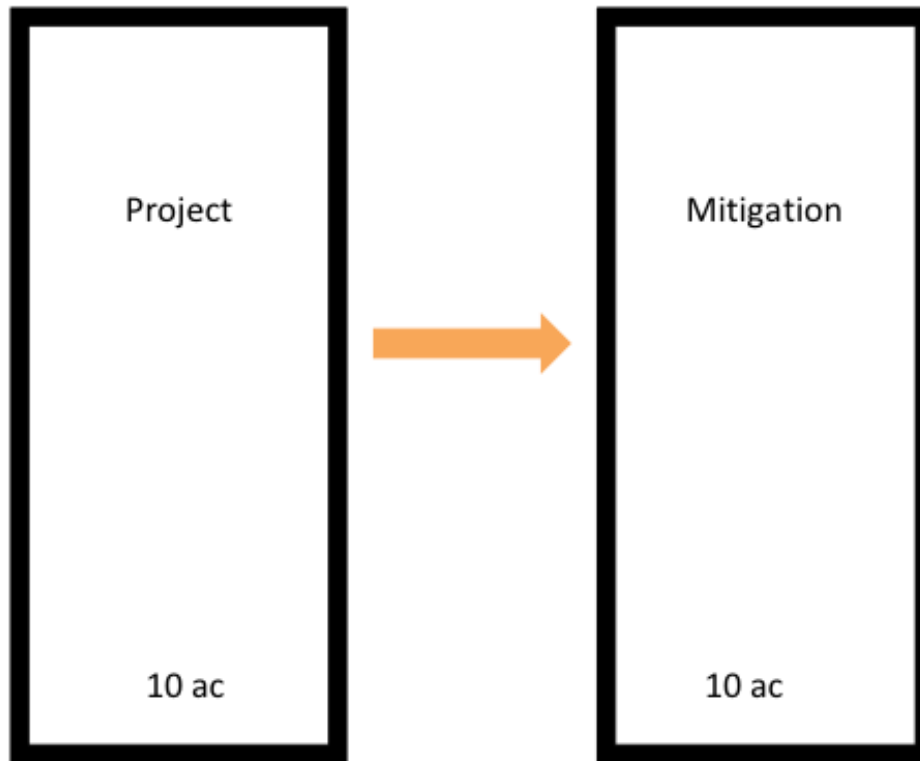
## Strategies:

- On-site preservation
- Off-site preservation
- Mitigation bank
- Habitat conservation plans/natural community conservation plans
- Regional advance mitigation plans

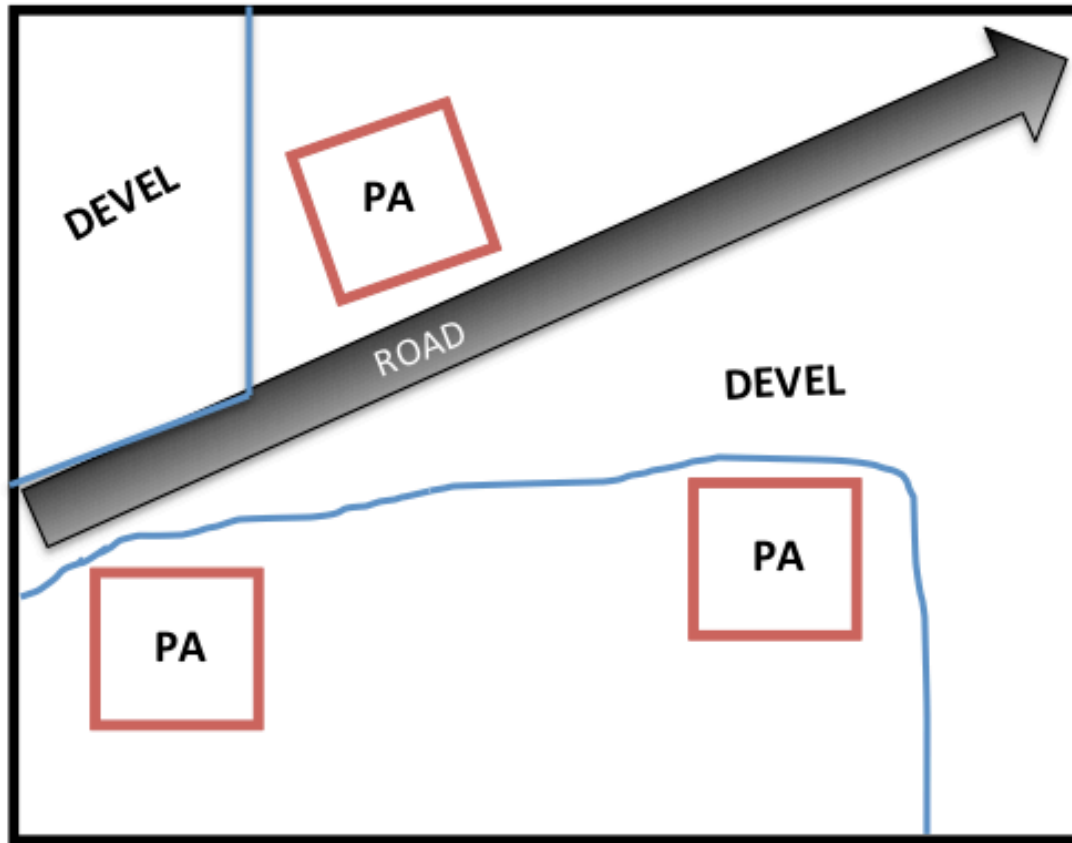
# On-Site Preservation



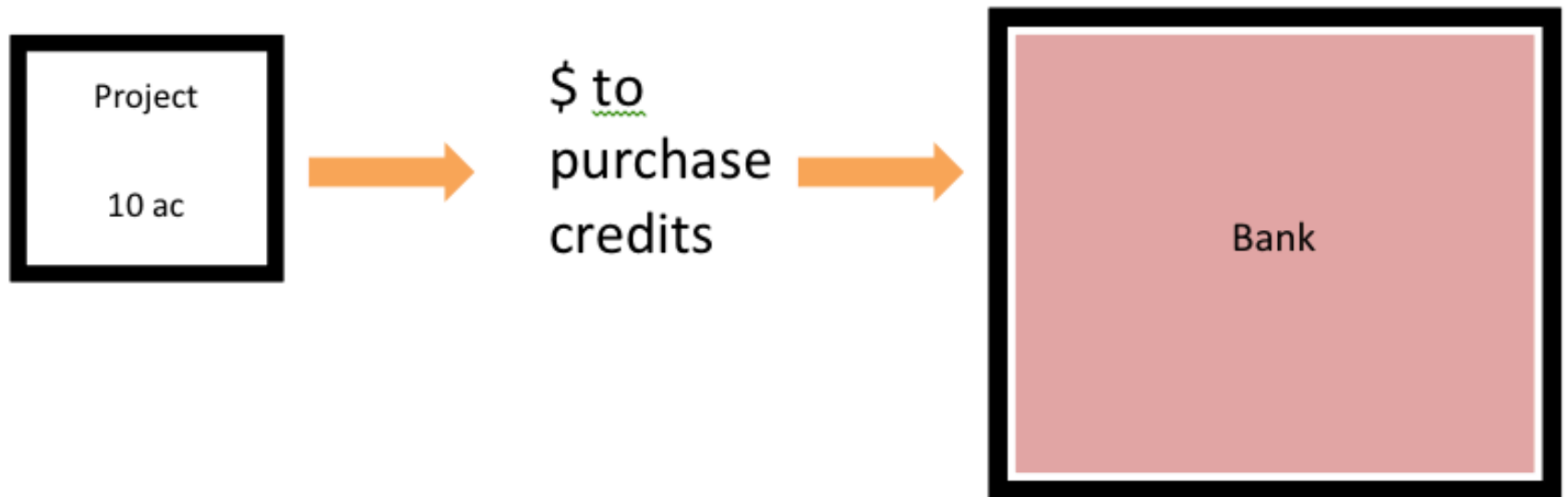
# Off-Site Preservation



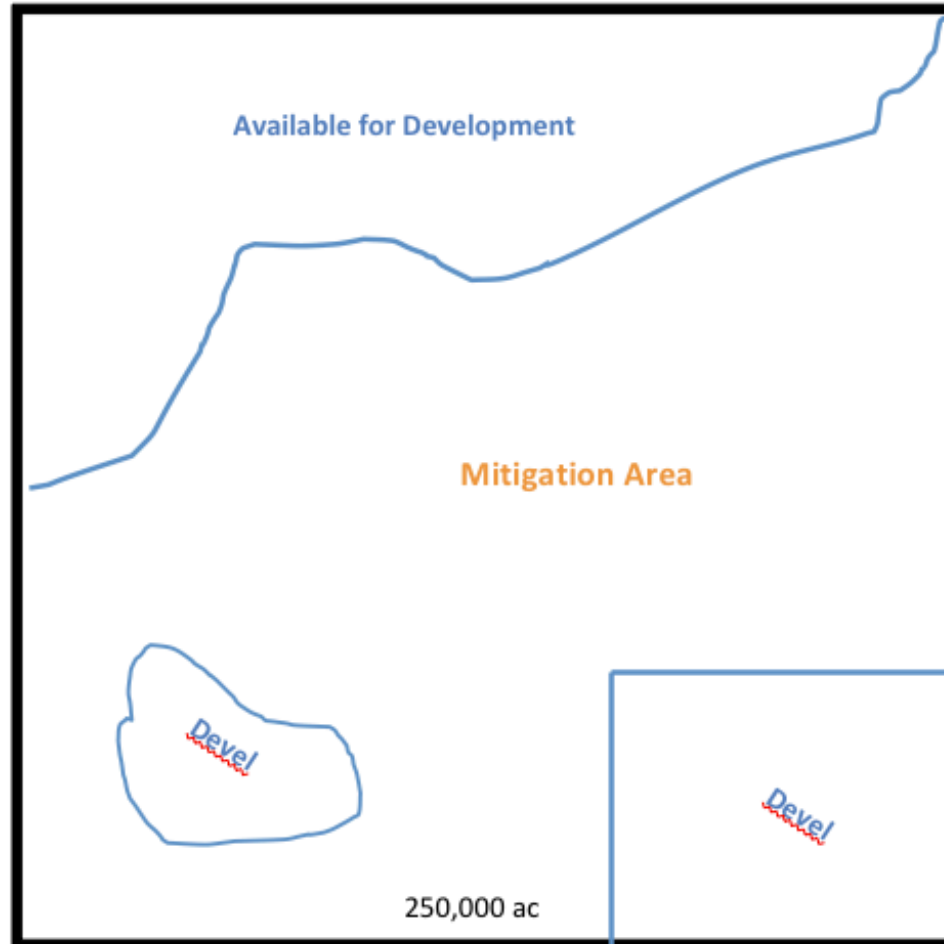
# Off-Site Preservation



# Mitigation Bank

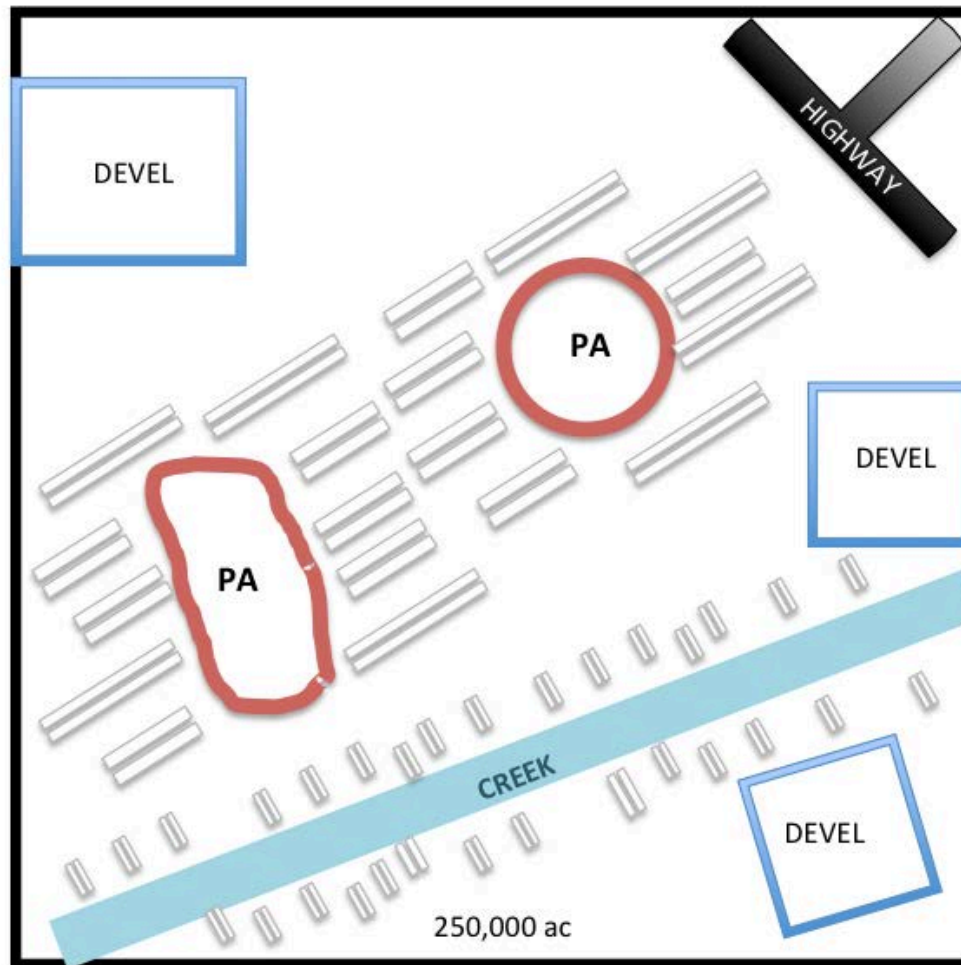


# HCCP - NCCP





# Regional Advanced Mitigation



PA = Protected Area

# Relevant Legislation

## Statutory Authority

- State & Federal Special Statutes, e.g., ESA, CWA, CESA, CEQA
- Local Ordinances
- Planning Authorities, e.g., NCCP

## Early CCLT priority to improve mitigation.

- 2006 – Nonprofits can hold mitigation properties
- 2007 – Nonprofits can hold mitigation when public agencies mitigating own projects
- 2007 – Regional mitigation planning permissible for Hwy 99 improvements
- 2008 – DFG endowment bill held in Legislature
- 2009 – General mitigation endowment bill vetoed by Governor
- 2011 – Mitigation endowment bill signed by Governor: SB 436
- 2012 – Further legislation to make changes to SB 436: SB 1094

**SB 1094 signed by Governor September 28, 2012.**

# SB 1094 (Kehoe) in 2012

## Structure of Bill

Sec 1 Intent Language

Sec 2 Definitions (§ 65965)

Sec 3 General Mitigation Provisions (§ 65966)

Sec 4 Property Provisions (§ 65967) \*\*

Sec 5 Endowment Provisions (§ 65968)

# Definitions - § 65965

## Endowment (a)

- Funds that are conveyed solely for the long-term stewardship of a mitigation property.
- Funds are held as charitable trusts that are permanently restricted.
- Funds shall be governed by the underlying laws, regulations and specific governmental approvals under those laws consistent with the Uniform Prudent Management of Institutional Funds Act (UPMIFA)

# Definitions - § 65965

## Mitigation Agreement (f) – 2 types recognized

- Written agreement between a project proponent and entity qualified to hold property and the endowment;
- Written agreement between project proponent and the entity qualified to hold the property, including any agreement with a qualified endowment holder.

## Project Proponent (i)

- An individual, business entity, agency, or other entity developing project or facility and required to mitigate any adverse impact upon natural resources.

# Definitions - § 65965

## Property (i)

- Fee title land or any partial interest in real property, including a conservation easement, that may be conveyed pursuant to a mitigation requirement by a state or local agency.

## Stewardship (l)

- Encompassing the range of activities involved in controlling, monitoring, and managing for conservation purposes a property, or a conservation or open-space easement, as defined by the terms of the easement, and its attendant resources.

# Definitions - § 65965

## Nonprofit Organization (h)

- Principal purpose and activity to direct protection of stewardship of land, water, or natural resources

## Special District (k)

- Park and open space district
- Resource conservation district
- County water district
- Water agency
- Local flood control district

# Definitions - § 65965

## Community Foundation <sup>(b)</sup>

- Must be accredited per National Standards for US Community Foundations.

## Congressionally Chartered Foundation <sup>(g)</sup>

- Purpose the conservation and management of fish, wildlife, plants, and other natural resources.

## Government Entity <sup>(e)</sup>

- Any state agency, office, officer, department, division, bureau, board, commission, public postsecondary educational institution, city, county, or city and county, or a joint powers authority as defined.



# General Provisions - § 65966

- Conservation easement must be perpetual. (a)
- May identify how long-term stewardship needs will be funded. (b)
- If endowment created, certain requirements imposed, i.e., endowment for specific property, principal to generate annual costs, UPMIFA consistency. (b)
- Non-profit shall use GAAP. (c)
- If agency holds endowment, then requirements for investment and payout. (d)

# General Provisions - § 65966

## **Endowment holder provides annual report to permitting agency. (e)**

- Contents: (A-H)
  - Balance of each endowment at beginning & end of period
  - Amount of contributions to endowment
  - Net amounts of earnings, gains, losses
  - Amounts distributed
  - Administrative expenses
  - Specific asset allocation percentages
  - Most recent financial statements
- DFG is collector if multiple agencies.
- DFG posts to website for a minimum of 5 years.
- Mitigation agreement may provide otherwise.

# General Provisions - § 65966

## Permissible Fees or Funds

- Agency Oversight – may require one-time fee:
  - State: reviewing qualifications of proposed property holders; must demonstrate actual review. (f)
  - Local: reviewing qualifications, approving those parties, and any regular oversight. (g)
- Initial Stewardship – agency may require project proponent to provide one-time payment. (h)
  - Funds for initial stewardship of up to three years.
  - These funds distinct from funds for permanent endowment.
  - Funds remaining at end of period returned to project proponent.

# General Provisions - § 65966

- Local agency may contract with or designate 3<sup>rd</sup> parties to review qualifications to hold property or endowments, or for on-going reporting. (i)
- Condemnation: net proceeds must go to purchase of similar property; endowment applies to replacement property. (i)
- Holder may contract with CFdn or CCFdn to manage endowments. (m)
- Mitigation agreement cannot waive or exempt parties from statutory language of SB 1094. (n)
- Short-term NCCPs establishes special direction for accumulations. (o)

# Property - § 65967

- If issuing permit, state/local agency may allow nonprofits, special districts, government entities, for-profits, etc., to hold and manage a mitigation property. (a)
- If state/local agency has to mitigate its own project, it may: (b)
  - Transfer interest/obligation to non-profit, etc.
  - Provide funds to non-profit, etc., to acquire property or restoration project.
  - Hold endowment for its own property.

# Property - § 65967

- Agency shall approve entity to hold property: (c)
  - “Exercise due diligence in reviewing qualifications of an entity to effectively manage and steward resources...”
  - May adopt guidelines to assist in review including reliance upon guidelines/standards in widespread state or national use.
- Agency may require no more than annual report on stewardship of property for specified number of years.  
(d)
- Reversion provision. (e)

# Endowment - § 65968

## Who can hold the endowment for a mitigation property?

- Government entity, special district, or nonprofit organization that holds the property or holds an interest in the property for conservation purposes. (b)(B)
- Agency/agencies that required the mitigation. (b)(A)
- Governmental entity or special district that holds property after conveying an interest for conservation purposes if the GE/SP is protecting, restoring or enhancing retained property. (b)(C)

# Endowment - § 65968

## Exceptions to 'who can hold endowment':

- Existing endowments as of 1/1/12. (2)(A)
- Endowments pursuant to NCCP or Safe Harbor agreement as conditioned. (2)(B)
- Prohibited entities, e.g., for-profit entities. (2)(C)
- If project proponent & mitg property holder agree that CFdn or CCFdn will hold. (2)(D)
- Federal agency holds/manages property. (2)(E)
- If both fed/state permits required and federal agency does not approve. (2)(F)



# Endowment- § 65968

**Endowment holder will certify to project proponent or property holder that:** (e)

- Has capacity to effectively manage funds.
- Has capacity to achieve reasonable rates of return similar to other prudent investors, in good faith, with similar care and consistent with UPMIFA.
- Utilizes GAAP per relevant standards.
- Can ensure that funds are accounted for and tied to specific property.
- Has investment policy consistent with UPMIFA.

# Endowment - § 65968

## **Additional Provisions Regarding ‘Who Can Hold Endowments’:**

- If entity meets requirements of chapter, it is qualified to be a holder of the endowment for the purpose of obtaining any permit, clearance or mitigation approval from state/local agency. (f)
- State/local agency shall not require, as a condition of obtaining a permit, that a preferred or exclusively-named entity hold the endowment. (k)

# Endowment - § 65968

## General Provisions:

- CFdn and CCFdn must meet all requirements of chapter for holding, managing, investing and disbursing endowment funds. (c)
- Entity holding endowment shall hold, manage, invest and disburse funds according to § 65965(a). (d)
- Endowments can be held temporarily in escrow until 12/31/12 and must then be transferred to permanent holder. (i)

# Endowment - § 65968

**For locally-approved projects, endowment may revert if:** (g)

- Entity ceases to exist.
- Entity is dissolved.
- Entity becomes bankrupt or insolvent.
- Local agency determines that endowment not being held, managed, invested or disbursed for conservation purposes and consistent with agreement.

# Endowment- § 65968

- Endowment section remains in effect until 1/1/2022.
- If endowment section repealed, any endowments held pursuant to the section will remain with their holders.

# California Mitigation Summit 2013



January 24, 2013

10am – 4pm

Red Lion Hotel Woodlake Conference Center

Sacramento CA

Questions?  
Comments?



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